TESTIMONY OF

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Mr. Chairman, members of the committee, thank you for inviting me. My name is Mathew Staver.[1] I am the Founder and Chairman of Liberty Counsel[2] and the Interim Dean of Liberty University School of Law.[3]

I have come today to address whether federal statutes 42 U.S.C. §§ 1983 and 1988 should be amended to exclude claims arising under the Establishment Clause of the First Amendment to the United States Constitution. Sections 1983 and 1988 are designed to encourage plaintiffs who suffer deprivation of their civil or constitutional rights to vindicate those rights in a court of law. Sections 1983 and 1988 are particularly suited

1 A detailed curriculum vitae is available upon request. In reference to the relevant issue before this Committee, my specialty is constitutional litigation. I have earned B.A., M.A. and J.D. degrees, an honorary LL.D. degree, am an AV rated attorney and Board certified by the Florida Bar in Appellate Practice. I have written ten books, most of which deal with constitutional law, including a recent 572 page book devoted exclusively to constitutional law. In reference to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, the sections under consideration before this Committee, I have conducted numerous continuing education credit courses for attorneys and law professors. I have also been called to testify in federal court regarding 42 U.S.C. § 1988, and have been recognized by federal courts as an expert on Section 1988 attorney's fees. I have written numerous briefs before the United States Supreme Court and presented oral argument before the High Court twice as lead counsel.

2 Liberty Counsel is a nonprofit litigation, education and policy organization founded in 1989. Liberty Counsel has offices in Florida and Virginia and has hundreds of affiliate attorneys in all 50 states. Liberty Counsel specializes in constitutional law.

3 Liberty University School of Law was founded in 2004 and received provisional accreditation by the American Bar Association on February 13, 2006.

for those cases in which the plaintiffs are ill-financed and where the law is relatively predictable. However, in Establishment Clause cases, many, if not most, of the plaintiffs are represented by public interest law firms which will finance the case whether or not a fee shifting statute exists.

Establishment Clause jurisprudence is the most unpredictable and confusing area of law. There have been and remain sharp disagreements between the Justices of the United States Supreme Court and lower court judges over the meaning and application of the Establishment Clause. In an area of law where there are conflicting court decisions for every conceivable proposition, it makes little sense to award attorney's fees and costs to plaintiffs with diametrically opposed positions. While conflicting court opinions will inevitably occur in any area of law, it is particularly troubling when conflicting opinions are the rule rather than the exception to the rule. By providing a fee shifting statute in such a confused area of law, the plaintiff often uses the threat of attorney fees to force government officials to a desired result, whether or not that result is the right one. It is my considered opinion that Establishment Clause claims should be excluded from Section 1988.

To better understand the problem, let me first begin by reviewing the background of 42 U.S.C. §§ 1983 and 1988 and then addressing the current state of Establishment Clause jurisprudence.

I. BACKGROUND OF RELEVANT FEE SHIFTING STATUTES.

A. 42 U.S.C. § 1983.

Originally called the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [4]

Section 1983 was enacted to "create a right of action in federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal

4 42 U.S.C. § 1983 (1996).

enforcement."[5] Representative Shellabarger, the Chairman of the House Select Committee, which drafted the Ku Klux Klan Act, said that the statute was "confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights."[6] The U.S. Supreme Court in *Monroe v. Pape*, held that Section 1983 served three purposes: (1) "to override certain kinds of state laws, (2) to provide a remedy where state law was inadequate, and (3) to afford a federal remedy where the state remedy, while adequate in theory, was not available in practice."[7] Section 1983 served as the vehicle of vindication for the deprivation of another's statutory or constitutional rights. [8]

The Members of the 96th Congress that enacted Section 1983 did not directly address the question of damages, but "the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871."[9] The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available

5 H.R. Rep. No. 96-548 (1979).

6 *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 164 (1970).

7 *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

8 H.R. Rep. No. 96-548.

9 *Carey v. Piphus*, 435 U.S. 247, 255 (1978).

under that section for actions found to have been violative of constitutional rights and to have caused compensable injury.[10] Section 1983 has led to the derogation of the American Rule[11] for damages, by allowing the prevailing party to recover not only damages, but attorney's fees as well.

B. 42 U.S.C. § 1988.

One of the exceptions to the American Rule is 42 U.S.C. § 1988(b), which states:

> In any action or proceeding to enforce a provision of sections 1981[12], 1981a[13], 1982,[14] 1983, 1985[15], and 1986[16] of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §

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10 *Id*.

11 BLACK'S LAW DICTIONARY (8th ed. 2004). The American rule is the general policy that all litigants, even the prevailing one, must bear their own attorney's fees; *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-262 (1975) (holding that prevailing parties in federal litigation may not recover their attorney's fees unless Congress has expressly authorized a fee-shifting statute pertinent to the case at bar.).

12 Equal rights under the law: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

13 Provides damages in cases of intentional discrimination in employment.

14 Property rights of citizens:"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

15 Provides a cause of action for conspiracy to interfere with civil rights.

16 Provides a cause of action for neglect to prevent violations of 42 U.S.C § 1985.

> 2000d et seq.], or section 13981[17] of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. [18]

Section 1988, known as "The Civil Rights Attorney's Fees Awards Act of 1976," made fee awards an essential remedy for private citizens who had the opportunity to assert their civil rights.[19] The remedy of attorney's fees is appropriate in the area of civil rights.[20] "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."[21] Whether Section 1988 is appropriate in the context of Establishment Clause claims is an entirely different question. I think it is not appropriate, as I will continue to explain.

C. Equal Access to Justice Act

17 Provides that "All persons within the United States shall have the right to be free from crimes of violence motivated by gender…"

18 42 U.S.C § 1988(b) (2000).

19 S. Rep. No. 94-1011 (1976).

20 *Id*.

21 *Id*.

Before continuing further, I need to point out another exception to the American Rule is the Equal Access to Justice Act (EAJA).[22] Under the EAJA, "courts may award reasonable attorney's fees to parties that have successfully litigated against the federal government in an action in which the government's position was not substantially justified."[23] Even if Section 1988 was amended to eliminate the award of attorney's fees, which I believe it should be, the EAJA remains a viable loophole to such a revision. Thus, I would urge this Committee to also consider similarly amending the EAJA to exclude from its purview Establishment Clause claims.

II. THE ESTABLISHMENT CLAUSE EXCEPTION TO STANDING RULES.

Section 1983's focus on civil rights claims has been expanded to cover constitutional claims, including Establishment Clause cases under the First Amendment. These claims are typically brought by public interest organizations, already financed by public, charitable support. These public interest organizations will continue to take Establishment Clause cases

22 The Equal Access to Justice Act provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees … incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1994).

23 John W. Finley, III, *Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade, Associations*, 53 J. URB. & CONTEMP. L. 243, 245 (1998).

without regard to such fee-shifting provisions. In fact, a good argument can be made that some frivolous claims will be eliminated by removing the threat of attorney's fees.

Plaintiffs bringing claims pursuant to the Establishment Clause or other Constitutional provisions must meet all three prongs of the "standing" test in *Lujan v. Defenders of Wildlife*.[24] "First, the plaintiff must have suffered an injury in fact- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[25] Simply put, the plaintiff must suffer a (1) direct and concrete injury, (2) which injury can be traced to the complained of action, and (3) which injury will be redressed by the litigation. This three-prong test

24 *Ganulin v. United States*, 71 F. Supp. 2d 824 (S.D. Ohio 1999).

25 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

helps to protect Article III courts, by ensuring that they are not giving advisory opinions, but rather are hearing only cases and controversies.[26]

Despite the *Lujan* test, lower federal courts have relaxed the standing requirements in Establishment Clause cases and have carved out exceptions to the normal standing rules that apply in every other area of litigation. In ruling on standing, the Supreme Court has held that "it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[27] In *McGowan v. Maryland*, the Court held that the standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause.[28]

The Sixth Circuit Court of Appeals has noted that First Amendment Establishment Clause plaintiffs do not bear a heavy burden, and the standing inquiry in such cases can be tailored to reflect the type of injury Establishment Clause plaintiffs are likely to suffer.[29] In *Briggs*, the court

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26 *Flast v. Cohen*, 392 U.S. 82, 96 (1968). The Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

27 *Id*. at 102.

28 *McGowan v. State of Maryland*, 366 U.S. 420, 429- 30 (1961).

29 *Briggs v. Ohio Elections Com'n,* 61 F.3d 487, 492 (6th Cir. 1995).

held that there is not a heavy burden to demonstrate "a claim of specific present objective harm or a threat of specific future harm."[30] "While it is clear that abstract injury is not enough to establish standing, it is equally clear that mere offense to individual values of an abstract or esoteric nature can provide the basis for standing."[31] In cases involving the Establishment Clause, the courts have lessened the standing requirements laid out in *Lujan* to seemingly fictitious injuries. In most lower federal courts, a plaintiff can bring an Establishment Clause challenge simply because the litigant claims that he or she is offended by the religious imagery or alleged religious action.[32] This exception to the general rules of standing has opened the floodgates of litigation. In no other area of law may a plaintiff bring a lawsuit based on mere offense.

III. CONFUSING AND CHANGING INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE.

In addition to the exception to the standing rules for Establishment Clause cases, there are confusing and changing interpretations of the Establishment Clause itself. The Supreme Court currently uses several tests, some of which actually conflict with one another, and sometimes the High

30 *Id*. at 492.

31 *Id*.

32 *See* Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 491-92 (1999) (noting that the "standing doctrine shifted" to allow plaintiffs much broader access to challenge governmental acts under the Establishment Clause).

Court forgoes using any test at all. Thus, litigants, government officials and judges are left to guess at the meaning of the Establishment Clause. If the Justices of the Supreme Court are conflicted over the meaning of the Establishment Clause, then it is particularly inappropriate to punish government officials with the threat of attorney's fees and costs for a mere misstep in this constitutional mine field.

A. Overview of the Supreme Court's Various Tests.

1. The Lemon Test.

The Court in *Lemon v. Kurtzman* applied a three-part test for deciding Establishment Clause cases.[33] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[34]

In *Lynch v. Donnelly*[35] and *County of Allegheny v. ACLU*,[36] the *Lemon* test was refined into an "endorsement" test and narrowed to the purpose and effects prongs. The purpose test focuses on the subjective intent of the government speaker and the effects on the objective meaning of the

33 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

34 *Id*. at 612-13.

35 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

36 *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

statement to a reasonable observer.[37] The purpose prong asks "whether government's actual purpose is to endorse or disapprove of religion," and the effects prong asks "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion.[38]

2. The Marsh Test.

In *Marsh v. Chambers*,[39] the Supreme Court did not use a specific test, but rather examined the Establishment Clause from an historical perspective. After chronicling history back to the debates on the Constitution and Bill of Rights, the Court held that legislative prayers were permissible since the same statesmen, on the same day they agreed on the language of the First Amendment, authorized Congress to pay a chaplain to open each session with prayer.[40] Contemporaneous actions taken by those who framed the First Amendment are "weighty evidence" of its intent.[41] "*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise

37 *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

38 *Id*. The entanglement prong has been subsumed into the effects prong and is concerned with "institutional" entanglement. The "political divisiveness" inquiry only applied to school funding cases, but has been discarded by cases post *Aguilar v. Felton*, 473 U.S. 402 (1985). *See Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); *Mitchell v. Helms*, 530 U.S. 793, 825-26 (2000) (plurality).

39 *Marsh v. Chambers*, 463 U.S. 783 (1983).

40 *Id*. at 786-91.

41 *Id*. at 790.

broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."[42] In many cases the outcome of the litigation will be entirely different depending on whether the Court applies the *Marsh* test instead of the *Lemon* test. There is almost no guidance when one is applicable and the other is not.

3. The Lee or Coercion Test.

The Court in *Lee v. Weisman* used yet another approach for Establishment Clause cases - a coercion test.[43] The Court held that "government may not coerce anyone to support or participate in religion or its exercise" or to act in a way that establishes a state religion, or tends to do so. The Court found that public school officials compelled young students to participate in "an overt religious exercise."[44] Justices of this Court have indicated at various times that coercion is part of the Free Exercise Clause but not the Establishment Clause, have discussed coercion as though it is part of the Establishment

42 *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part, dissenting in part).

43 *Lee v. Weisman*, 505 U.S. 577 (1992).

44 *Id*. at 587-88.

Clause, or have stated that coercion alone is insufficient.[45] Even within one test, the United States Supreme Court is conflicted and confused as to its application.

4. A New Test and No Test.

Justice O'Connor proposed a new test for Establishment Clause cases in *Elk Grove Unified School District v. Newdow*.[46] Justice Thomas has written that the Establishment Clause does not apply to the states, and thus restricts only the federal, not state, government. [7]4

The final option for analysis of Establishment Clause cases is to use no test at all. This classic case was presented in 2005 with the two decisions by the High Court on the Ten Commandments. In the Kentucky case, the Supreme Court used a modified *Lemon* test, but in the Texas case, argued and decided the same day, the Court used no test at all.

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45 Not part of Establishment Clause: *Lee*, 505 U.S. at 604 (Blackmun, J., concurring); *Id.* at 619 (Souter, J., concurring); *County of Allegheny*, 492 U.S. at 597 n.47; *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963)(apparently rejecting coercion but then discussing "indirect coercion"); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (same); Discussing coercion: *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2320 (2004) (Rehnquist, C.J., concurring) (distinguishing between compulsion in *West Virginia Bd.* o *f Ed* v. *Barnette*, 319 U.S. 624 (1943) and coercion in *Lee*); *Id.* at 2327 (O'Connor, J., concurring); *Id.* at 2328-31 (Thomas, J., concurring); *Good News* Club v. Milford Cent. Sch., 533 U.S. 98, 121 (2001) (Scalia, J., concurring); *Mitchell* v. *Helms*, 530 U.S. 793, 870-71 (2000) (Souter, J., dissenting); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 719 (1994)(O'Connor, J., concurring in part); *Bd. of Ed. of Westside of Cmty. Sch. v. Mergens by & through her next Friend, Mergens, et al.*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part); *County of Allegheny*, 492 U.S. at 657-63 (Kennedy, J., concurring in part, dissenting in part);*Wallace* v. *Jaffree*, 472 U.S. 38, 60 (1985); *Zorach v. Clauson*, 343 U.S. 306, 311-14 (1952); *Id.* at 321 (Frankfurter, J., dissenting); Coercion insufficient by itself: *County of Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring in part).

46 *Newdow*, 124 S. Ct. at 2322 (2004) (O'Connor, J., concurring).

47 *Id.* at 2328. (Thomas, J., concurring) ("The Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

IV. EXAMPLES OF CONFUSING AND CONFLICTING ESTABLISHMENT CLAUSE JURISPRUDENCE.

That the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused "hopeless confusion" is no surprise, as many members of the Supreme Court have voiced opposition to its continued use.[48] *Lemon* is not solely to blame for the infamous three-part test because it merely stated what the Court had previously done.[49] Nevertheless, the chaos caused by *Lemon* led Justice Kennedy to state: "Substantial revision of our Establishment Clause doctrine may be in order...."[50]

The Supreme Court acknowledged that there is no "rigid caliper" or "single test" and that *Lemon* was only meant as a "guideline."[51] Yet, the "guideline" continues to overshadow Establishment Clause jurisprudence. *Lemon* has fractured the Court and caused scholars and litigators to wonder

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48 *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)("checkered history"); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000)(Scalia, J., dissenting from denial of certiorari)(would grant certiorari to "inter the *Lemon* test"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994)(Scalia, J., dissenting)("meaningless"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring)("stalks our Establishment Clause jurisprudence"); *Wallace v. Jaffree,* 472 U.S. 38, 67 (1985)(O'Connor, J., concurring)("should be reexamined and refined"); *Id.* at 91 (White, J., dissenting); *Id.* at 110-11 (Rehnquist, J., dissenting)(*Lemon* has spawned "unworkable plurality opinions," "consistent unpredictability" and "unprincipled results"); *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (Stevens, J., dissenting)(requires "sisyphean task" to apply the test).

49 The purpose and effects of a government activity were first mentioned in *McGowan v. Maryland*, 366 U.S. 420, 443, 445 (1961), *Schempp*, 374 U.S. at 222, and *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The entanglement prong was first announced in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

50 *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989)(Kennedy, J., concurring in part, dissenting in part).

51 *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting); *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting); *Wallace,* 472 U.S. at 86 (Burger, C.J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

if there is any hope for consistency. There are as many conflicting decisions on virtually identical fact patterns as there are judges to decide them.

For almost every federal district court opinion stating one proposition, one can find another federal district court holding exactly the opposite. Many of these cases have not been appealed through the appellate level, and most have not made their way to the United States Supreme Court. Consequently, many of the federal district court cases still remain and have never been clarified. Because the Supreme Court has developed such an unworkable test, it has opened the floodgates to Establishment Clause litigation. Courts have gone in all directions applying the *Lemon* test, and litigants have often been frustrated when they first enter the federal district court and are unable to take the case any higher to have it clarified or possibly overturned. To illustrate this point, I will overview a number of conflicting decisions considering the same issue. In most cases only the federal district court cases have been cited simply to illustrate the confusion among those courts. While the propositions stated below may not be the final ruling of the court, as the case may have been appealed to a higher judicial body, the cases are cited to illustrate the religious liberty quagmire.[52]

52 The cases cited between footnotes 52 and 113 are mostly citations to the federal district courts. These cases are not shepardized and may have been overruled by either a circuit court of appeals or the United States Supreme Court. The cases are listed only as examples of the confusion caused by the *Lemon* test and therefore may not represent the final holding or established law.

In the area of release time, courts have allowed students to go off school premises for religious instruction[53] so long as the instruction did not take place near the school building.[54] Some courts have ruled it is unconstitutional for students to hand carry attendance slips from the parochial instruction back to the public school.[55] Other courts have ruled that elective credit cannot be given for the parochial course.[56] Some courts have ruled that public school intercoms were permitted in seminary classrooms and public schools could maintain mailboxes for seminary instructors.[57] Schools have been forced to defend the recognition of religious observances[58] and the prohibition of school dances.[59]

A parochial school child can participate in a public school band course,[60] but cannot participate in an all-county band.[61] If a parochial school

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53 *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981); *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975); *State v. Thompson*, 225 N.W.2d 678 (Wis. 1975).

4 *Doe v. Shenandoah County School Board*, 737 F. Supp. 913 (W.D. Va. 1990).

5 *Lanner*, 662 F.2d at 1349; *Thompson*, 225 N.W.2d at 678.

6 *Lanner*, 662 F.2d 1349; *See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990).

7 *Id*.

58 *See Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980). *See also Student Members of Playcrafters v. Board of Education*, 424 A.2d 1192 (N.J. 1981) (School board forced to defend policy of prohibiting extracurricular activities on Friday, Saturday, and Sunday).

9 *See Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989).

0 *Snyder v. Charlotte Public School District*, 365 N.W.2d 151 (1985).

1 *Thomas v. Allegheny County Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982).

child needs remedial services, the district may be allowed to fund services at the student's school,[62] but such provision may be void on its face,[63] or funds may be allowed only if services are performed at "neutral sites."[64]

Public funds may be used to lease classroom space from a church related school, but only if public school children are shielded from religious influence.[65] Public schools may[66] or may not[67] lease classroom space in parochial schools. Private school students or religious organizations may[68] or may not[69] be permitted to utilize public school facilities. Financial

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62 *See Walker v. San Francisco Unified School District*, 741 F. Supp. 1386 (N.D. Cal. 1990), *reh'g denied*, 62 F.3d 300 (9th Cir. 1995); *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

3 *Wamble v. Bell*, 598 F. Supp. 1356 (W.D. Mo. 1984); *Viss v. Pittenger*, 345 F. Supp. 1349 (E.D. Pa. 1972).

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64 *Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984); *Pulido v. Cavasos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Filler v. Port Washington University Free School District*, 436 F. Supp. 1231 (E.D.N.Y. 1977); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

5 *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

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66 *Spacco v. Bridgewater School Department*, 722 F. Supp. 834 (D. Mass. 1989); *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Americans United for Separation of Church & State v. Paire*, 348 F. Supp. 506 (D.N.H. 1972); *Citizens to Advance Public Education v. Porter*, 237 N.W.2d 232 (Mich. 1976) (shared time secular education program).

67 *See Americans United for Separation of Church & State v. School District of Grand Rapids*, 546 F. Supp. 1071 (W.D. Mich 1982); *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp. 1059 (E.D. Ky. 1974).

68 *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990); *Parents Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986); *Country Hills Christian Church v. Unified School District*, 560 F. Supp. 1207 (D. Kan. 1983); *Resnick v. East Brunswick Township Board of Education*, 389 A.2d 944 (N.J. 1978); *cf. Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (University must allow recognized student organizations to use school facilities for religious purposes).

69 *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982); *Lamb's Chapel v. Center Moriches School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990); *Resnick v. East Brunswick Township Board of Education*, 343 A.2d 127 (N.J. 1975); *cf. Wallace v. Washoe County School Board*, 701 F. Supp. 187 (D. Nev. 1988); *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

assistance programs for needy students attending private schools have failed the *Lemon* test.[70] Some courts have disqualified private college students from receiving government tuition grants,[71] while other courts have allowed such grants.[72] Some plans have been upheld only when the use of the funds is restricted.[73] Students may receive grants to study philosophy or religion in public schools, but not theology in pervasively sectarian schools failing a 36-prong test.[74] However, Veteran's Administration, and some handicap tuition assistance programs, have generally been held valid for recipients attending sectarian schools.[75]

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70 *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972); *People v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Weiss v. Bruno*, 509 P.2d 973 (1973), *contra Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973).

71 *See d'Errico v. Lesmeister*, 570 F. Supp. 158 (D.N.D. 1983); *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974); *Americans United for Separation of Church & State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974); *Opinion of the Justices*, 280 So. 2d 547 (Ala. 1973); *State v. Swanson*, 219 N.W.2d 727 (Neb. 1974). *But cf. Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972) (loans constitutional).

72 *See Americans United for Separation of Church & State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977); *Lendall v. Cook*, 432 F. Supp. 971 (D. Ark. 1977); *Americans United for Separation of Church & State v. Rogers*, 538 S.W.2d 711 (Mo. 1976); *Cecrle v. Illinois Educational Facilities Authority*, 288 N.E.2d 399 (Ill. 1972).

73 *See Walker*, 741 F. Supp. at 1386; *Lendall,* 432 F. Supp at 971; *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

74 *See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp 694 (D. Minn. 1990); *But cf. In Re Dickerson*, 474 A.2d 30 (N.J. 1983) (testamentary scholarships for ministry students at public institute constitutional).

75 *Witters v. Washington Department of Service of the Blind*, 474 U.S. 481 (1986); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974).

Some courts have ruled that the state may provide bus transportation to private school children,[76] but in Rhode Island, the enabling statute was stricken three times.[77] Public funds cannot be used to provide textbooks to private school students in some states,[78] but in others, it is acceptable for the state to reimburse parochial schools for textbook expenditures.[79] Decisions have limited the provision of educational materials to sectarian schools.[80] In some cases states may not reimburse a sectarian school for costs incurred performing state-mandated tasks, such as testing and record-keeping,[81] but in other cases it is permissible.[82]

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76 *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (provision valid but not severable); *Cromwell Property Owners Association v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979); *Board of Education v. Bakalis*, 299 N.E.2d 737 (1973); *State v. School District*, 320 N.W.2d 472 (Neb. 1982); *Springfield School District v. Department of Education*, 397 A.2d 1154 (Pa. 1979); *cf. Americans United for Separation of Church & State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975) (no cross-district transport).

77 *Members of Jamestown School Committee v. Schmidt*, 699 F.2d 1 (1st Cir. 1983); *Members of Jamestown School Committee v. Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981); *Members of Jamestown School Committee v. Schmidt*, 427 F. Supp. 1338 (D.R.I. 1977).

78 *California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *contra Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848 (8th Cir. 1983); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976); *Cunningham v. Lutjeharms*, 437 N.W.2d 806 (Neb. 1989).

79 *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Pennsylvania Department of Education v. The First School*, 348 A.2d 458 (Pa. 1975).

80 *Americans United for Separation of Church & State v. Oakey*, 339 F. Supp. 545 (D. Vt. 1972); *but see Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

1 *Committee for Public Education & Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972).

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82 *Committee for Public Education & Religious Liberty v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978); *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

State regulation of private schools regarding compulsory attendance,[83] teacher certification,[84] and curriculum[85] have been upheld. State employees may not teach or provide remedial services in private schools,[86] but may visit classrooms to observe both secular and religious teaching, suggest teacher replacements, and review accreditation.[87] However, student teachers may not receive credit for teaching at parochial schools.[88]

State inquiry into a religious organization's operating costs violates the Establishment Clause,[89] unless requested by the Internal Revenue Service.[90] The state may enforce compliance with minimum wage laws,[91] the

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83 *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Attorney General v. Bailey*, 436 N.E.2d 139 (Mass. 1982); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

84 *Fellowship Baptist Church*, 815 F.2d at 486; *but cf. Bangor Baptist Church v. State*, 549 F. Supp. 1208 (D. Me. 1982); *Johnson v. Charles City Community Schools Board of Education*, 368 N.W.2d 74 (1985); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W.2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981). *cf. State v. Anderson*, 427 N.W.2d 316 (N.D. 1988) (home schooling parents violated teacher certification requirements).

85 *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 952 (1st Cir. 1989); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W. 2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981); *cf. New Jersey State Board of Higher Education v. Board of Directors*, 448 A.2d 988 (N.J. 1982) (prohibiting conferring of degree by unlicensed institution applied to a sectarian college whose religious doctrine precluded state licensure).

86 *Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Wamble*, 598 F. Supp 1356; *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp 1059 (E.D. Ky. 1974); *but see Walker*, 741 F. Supp. at 1386.

7 *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 952 (1st Cir. 1989).

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8 *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986).

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89 *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979); *Fernandez v. Lima*, 465 F. Supp. 493 (N.D. Tex. 1979). *See also Heritage Village Church & Missionary Fellowship v. State*, 263 A.2d 726 (N.C. 1980) (act requiring only certain religious groups to file information is unconstitutional).

90 *United States v. Freedom Church*, 613 F.2d 1316 (1st Cir. 1979); *Lutheran Social Service v. United States*, 583 F. Supp. 1298 (D. Minn. 1984); *cf. Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir. 1987); *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989) (state inquiry into church

Fair Labor Standards Act,[92] and force participation in FICA and FUTA,[93] despite an organization's religious beliefs to the contrary. The National Labor Relations Board may not be applicable to parochial schools,[94] but a state labor board may have jurisdiction.[95] Sectarian schools are prohibited from utilizing CETA workers.[96] Civil rights statutes have not been enforced against religious organizations,[97] but courts have split as to whether the

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records does not violate entanglement prong).

91 *Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola*, 628 F. Supp. 1173 (D.P.R. 1985); *Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320 (W.D. Va. 1983).

92 *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O St. Baptist Church v. E.E.O.C.*, 616 F. Supp. 1231 (W.D. Ky. 1985); *Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982).

93 *South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203 (6th Cir. 1990) (church included within workers' compensation system); *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987); *Young Life v. Division of Employment & Training*, 650 P.2d 515 (Colo. 1982) (religious organization subject to unemployment tax); *Baltimore Lutheran High School Association v. Employment Security Administration*, 490 A.2d 701 (Md. 1985) (school subject to unemployment tax); *Contra Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W. 767 (N.D. 1980) (church not subject to unemployment tax); *The Christian Jew Foundation v. State*, 353 S.W.2d 607 (Tex. 1983) (organization exempt from unemployment tax); *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) (school exempt from unemployment tax).

94 *Universidad v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985); *see also N.L.R.B. v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985); *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980); *Catholic Bishop v. N.L.R.B.*, 559 F.2d 1112 (2d Cir. 1977); *McCormick v. Hirsh*, 460 F. Supp. 1337 (M.D. Pa. 1978); *contra N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977).

95 *Goldsborough Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977); *cf. Catholic High School Association v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

96 *Decker v. O'Donnell*, 663 F.2d 598 (7th Cir. 1980) (CETA created entanglement); *see also Decker v. Department of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979).

97 *Dayton Christian Schools v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (N.D. Tex. 1980); *E.E.O.C. v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978); *contra Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980); *McLeod v. Providence Christian School*, 408 N.W.2d 146 (Mich. 1987); *but see E.E.O.C. v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).

"reasonable accommodation" requirement may be enforced against secular employees.[98] As a result, religious institutions have been forced to departmentalize between those employees who carry on the ministry and mission of the institution from other employees who perform routine tasks. Thus, while a religious institution may discriminate on the basis of religion in hiring and firing a school professor, it may not do the same to a secretary.

Two entanglement triangles arise in the provision of child care. First, the state may purchase child care services from religiously affiliated organizations[99] and may consider the religious preference of the parents for placement,[100] but the agency cannot impose its religious doctrine upon a child.[101] Second, religious child care facilities exempted from licensure may or may not be deemed to fail the *Lemon* test.[102] Church-run day care centers

98 *Protos v. Volkswagon of America, Inc.,* 797 F.2d 129 (3d Cir. 1986); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981); *E.E.O.C. v. Jefferson Smurfit Corp.*, 724 F. Supp. 881 (M.D. Fla. 1989); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979); *Michigan Department of Civil Rights v. General Motors*, 317 N.W. 16 (Mich. 1982); *American Motors Corp. v. Department of Industry, Labor, & Human Relations*, 286 N.W.2d 847 (Wis. 1978).

99 *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

100 *Id., cf. Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. 1982) (religious affiliation requirements in adoption proceeding constitutional); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (statute specifying religious needs of child upheld); *Zucco v. Garrett*, 501 N.E.2d 875 (Ill. 1986) (awarding custody based on religious practices is abuse of discretion).

101 *Arneth v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988).

102 *Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (4th Cir. 1984); *Forte v. Colder*, 725 F. Supp. 488 (M.D. Fla. 1989); *see The Corpus Christi Baptist Church, Inc. v. Texas Department of Human Resources*, 481 F. Supp. 1101 (S.D. Tex. 1979); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 578 (E.D. Cal. 1988); *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984); *State Department of Social Services v. Emmanuel Baptist Pre-School*, 455 N.W.2d 1 (Mich. 1990); *Pre-School Owner's Association v. Department of Children & Family Services*, 518 N.E.2d 1018 (Ill. 1988); *Arkansas Day Care Association v. Clinton*, 577 F. Supp. 388 (E.D. Ark. 1983). *cf.*

are subject to zoning restrictions,[103] but a city may not exempt them from requirements imposed upon commercial operators.[104]

Courts are divided over whether the state may[105] or may not[106] erect a cross as a war memorial. Where a state exercised eminent domain over a cemetery, a court prohibited the state from erecting crosses and a statue of Jesus, but allowed the state to provide and erect religious markers chosen by the descendants.[107] Crosses placed on government property have generally been prohibited,[108] but crosses and religious symbols on official seals may or may not be permissible.[109]

State v. McDonald, 787 P.2d 466 (Okla. 1989) (religious affiliated "boy's ranch" subject to state licensing requirements).

103 *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984).

104 *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *cf. Arkansas Day Care Association*, 577 F. Supp. 388 (statute disparately treated religious facilities).

105 *Eugene Sand & Gravel, Inc. v. Eugene*, 558 P.2d 338 (1976).

106 *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

107 *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

108 *Mendelsohn v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); *Hewitt v. Joyner*, 705 F. Supp. 1443 (C.D. Cal. 1989); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

109 *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Friedman v. Board of City Commissioners*, 781 F.2d 777 (10th Cir. 1985); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Johnson v. Board of County Commissioners*, 528 F. Supp. 919 (D.N.M. 1981); *Murray v. City of Austin,* 744 F. Supp. 771 (W.D. Tex. 1990).

The Ten Commandments have been removed from schools,[110] but permitted to remain on other public property.[111] A legislature may designate a room for prayer and meditation, but religious decorations or use of the room may be prohibited.[112]

An order of then-Governor Ronald Reagan giving state employees a three hour paid holiday on Good Friday violated the Establishment Clause,[113] but a school district was permitted to designate Good Friday a paid holiday in conjunction with a Union Contract.[114]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[115] Justice Scalia noted in his concurrence the fact that the Court sometimes decides to use a test and sometimes it does not

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again by frightening little children and school attorneys . . . . Its most recent burial, only last Term [in

110 *Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.N.D. 1980).

111 *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1972).

112 *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

113 *Mandel v. Hodges*, 54 Cal. App. 3d 596 (1976).

114 *California School Employees Association v. Sequoia Union High School District*, 67 Cal. App. 3d 157 (1977); *cf. Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987) (state may declare Good Friday a legal holiday).

115 *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 397 (1993) (Scalia, J., concurring).

> *Lee v. Weisman*[116]] was, to be sure, not fully six-feet under . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinion, personally driven pencils through the creature's heart . . . .
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish to do so, but we can demand it to return to the tomb at will . . . . When we wish to strike down a practice it forbids, we evoke it . . . . Sometimes we take a middle ground of course, calling its three prongs "no more than helpful sign posts." Such a docile and useful monster is worth keeping around, at least in a somnolent state: one never knows when one might need him.[117]

The decisions in both *McCreary County, Kentucky v. ACLU of Kentucky*[118] and *Van Orden v. Perry* further show the conflicting and confusing interpretations of the Establishment Clause. Both of these cases involved the Ten Commandments and were argued and delivered on the exact same day; however, the Court's analysis was not consistent. In *McCreary*, the Court used a modified *Lemon* test, focusing primarily on the purpose prong.[119] In *Van Orden*, the Court did not use the *Lemon* test at

116 The Court did not use the Lemon test, but instead used a newly-created "coercion" test.

117 *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring in judgment)(citations omitted).

118 *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

119 *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (2005). The majority in that case certainly implies *Lemon's* continued vitality by conducting purpose analysis. The majority never explicitly reaffirms *Lemon* because the inquiry ended when the Court held the displays unconstitutional as having an impermissible purpose.

all.[120] On December 20, 2005, the Sixth Circuit Court of Appeals upheld the identical Ten Commandments display the Supreme Court had declared unconstitutional in the *McCreary County* case. In *ACLU of Kentucky v. Mercer County, Kentucky*, the federal court of appeals denoted that the different interpretations and applications of Establishment Clause have left lower court judges in "Establishment Clause purgatory."[121]

To add to the confusion, the Court has been inconsistent on when something is or is not a violation of the Establishment Clause. In *McCreary,* the Court held that the Ten Commandments display may be constitutional in one county, while unconstitutional in another.[122] The eyes that look to purpose belong to an " 'objective observer,' " one who takes account of the traditional external signs that show up in the " 'text, legislative history, and implementation of the statute,' " or comparable official act.[123] Therefore, the constitutionality of a Ten Commandments display would depend on a person's subjective understanding of its purpose, which could vary from county to county.

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120 *Id*. A plurality of the Court in *Van Orden* disregarded the Lemon test, noting that Lemon is not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. The plurality instead employed an analysis driven by both the nature of the monument and by our Nation's history.

121 Id.

122 *McCreary*, 125 S. Ct. at 2722.

123 *Id*. at 2734.

Similar to *McCreary* was *Van Orden*.[124] There, the constitutionality of a Ten Commandments display was dependent upon how long it had been present on the State Capitol grounds. "Acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[125]

Following suit, the circuit courts, like the Supreme Court, have bought into the confusing and changing interpretations of the Establishment Clause in the context of prayer at school board meetings. Prayers are frequently said at county, municipal and school board meetings, as well as other meetings of public officials. In many respects, these prayers are very similar to prayers preceding legislative sessions.

A federal court of appeals ruled that a resolution of the Board of St. Louis County in Minnesota which provided for an invocation at its public meetings was not a violation of the First Amendment Establishment Clause.[126] Under this policy, a board of commissioners invited local

124 *Van Orden*, 125 S. Ct. at 2854.

125 *Id*. at 2862.

126 *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979).

clergymen to offer prayers prior to the commencement of each board meeting. The chairman of the board would generally announce the following: As is our practice, the Reverend John Doe will now give a prayer. The Court found that this practice was consistent with the First Amendment because the prayer had a "secular legislative purpose of setting a solemn tone for the transaction of governmental business" and assisted the maintenance of order and decorum.[127] The practice of opening these board meetings with prayers was not "an establishment of religion proscribed by the establishment clause of the First Amendment in any pragmatic, meaningful and realistic sense of that clause."[128] Similarly, the state Supreme Court of New Hampshire ruled that inviting local ministers to open town meetings with an invocation was not prohibited by the First Amendment Establishment Clause.[129]

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127 *Id.* at 1114-115.

128 *Id.* at 1115.

129 *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968). Other courts have similarly ruled that prayers offered at the outset of public assemblies are constitutional. *See, e.g., Marsa v. Wernik*, 430 A.2d 888 (N.J.), *app. dismissed and cert. denied*, 454 U.S. 958 (1981) (prayer at the outset of borough council meeting constitutional); *Lincoln v. Page*, 341 A.2d 799 (N.H. 1968) (invocation at town meeting constitutional); *Colo v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) (salaries for legislative chaplains constitutional); *Snyder v. Murray City Corp.*, 902 F. Supp. 1444 (D. Utah 1995) (statements by a minister at outset of council meeting constitutional).

In a 2-to-1 decision, one federal appeals court ruled that prayer offered at the opening of a school board meeting is unconstitutional.[130] The Cleveland school board traditionally opened its deliberative session with prayer. Historically, the school board invited representatives of the protestant, Roman Catholic, Jewish and Muslim faiths. The federal district court upheld the practice, but two of the three appeals court judges voted to reverse the decision.[131]

Similarly, the Fourth Circuit Court of Appeals struck down the practice of opening a town council meeting with prayer.[132] However, just one year later, the same federal appellate court held that a different county's practice of opening a county board meeting with prayer did not violate the Establishment Clause.[133]

A California federal court found that the Palo Verde Unified School District's practice of opening each meeting with prayer did not violate the Constitution.[134] In upholding the practice, the court relied on the Supreme

130 *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999).

131 *Coles v. Cleveland Bd. of Educ*., 950 F. Supp. 1337 (N.D. Ohio 1996) (reasoning that prayers at school board meetings are no different than prayers at legislative meetings, thus finding that the Supreme Court decision in *Marsh* controls the outcome).

132 *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004).

133 *Simpson v. Chesterfied Cty. Bd. Of Supervisors*, 404 F.3d 276 (4th Cir. 2005).

134 *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp.2d. 1192 (C.D. Cal. 1998).

Court's legislative prayer case in *Marsh*. The court noted that school board meetings, unlike classroom sessions, are composed primarily of adults. The "fact that at any given board meeting there may be children present in the audience, some of whom may participate in an awards session or address the board on a particular topic, does not change the nature or the function of the board meeting. A board meeting is a meeting of adults with official business and policymaking functions."[135]

If the opinions of this Court give jurists "blurred" vision to "dimly" perceive permissible Establishment Clause lines, then they certainly will affect elected officials' vision of constitutionality, entitling them to some grace in trying to negotiate the territory.[136] In the constitutional minefield established by *Lemon*, where the line bends and curves, ebbs and flows, generating numerous pluralities, surely courts must not punish government officials by assessing damages and attorney's fees and costs.

V. THE PUBLIC EXPRESSION OF RELIGION ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The stated purpose of H.R. 2679, the Public Expression of Religion Act ("Act"), is "to eliminate the chilling effect on the constitutionally protected expression of religion by State and local officials that results from

135 *Id.* at 1197.

136 *See, e.g., Mitchell*, 530 U.S. at 807; *Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 612.

the threat of damages and attorney's fees." This stated purpose is neutral and serves a secular purpose. The object is to limit the exposure of government entities in an area of law that is extremely unclear. The Act does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. The Act has a predominately secular purpose and does not have the primary effect of advancing or inhibiting religion.

The Supreme Court has held that a law must have a secular legislative purpose if it is to survive Establishment Clause review. *See Lemon v. Kurtzman*.[137] The government may not act "with the ostensible and predominant purpose of advancing religion."[138] This requirement "does not mean that the law's purpose must be unrelated to religion;" it means only that Congress may not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters."[139]

Although the Act addresses the subject of religion, its purpose is not to advance any particular religion, or to promote religion over nonreligion. Creating an environment that fosters lawful activity or speech, including

137 403 U.S. 602, 612 (1971).

138 *McCreary County, Ky. v. American Civil Liberties Union of Ky*., 125 S.Ct. 2722, 2733 (2005).

139 *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

religious speech, is a legitimate secular purpose.[140] In *Widmar*, a religious student group challenged a state university policy that allowed only secular student organizations to use campus facilities. The university attempted to defend its policy on the grounds that an "open forum" policy would offend the Establishment Clause. The Supreme Court dismissed that argument and held that an equal access policy, having the secular purpose of providing a forum for religious as well as secular speech, would be constitutional.[141]

Several federal courts have applied the *Widmar* rationale in other settings. In *Chabad-Lubavitch of Ga. v. Miller*,[142] a religious group wanted to place a Chanukah menorah in the rotunda of the Georgia capitol. Although Georgia had allowed other groups to use the rotunda for expressive activities, it refused to permit the menorah display. When the religious group filed suit, claiming that the state had violated its right of free speech, Georgia stated in its defense that it had a compelling state interest in avoiding the Establishment Clause violation that would result from the display. Siting *en banc*, the Court of Appeals for the Eleventh Circuit held that neutral treatment of the menorah would "advance the secular purpose of providing an arena for its citizenry's exercise of the constitutional right to

140 *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

141 *Id.*

142 5 F.3d 1383 (11th Cir. 1993) (en banc).

free speech."[143] Other courts have similarly found that government policies permitting religious displays in public parks have a valid secular purpose.[144]

Although the above-cited opinions address the issue of equal access to government property for religious speech, those cases are relevant to the constitutionality of this Act because they stand for the principle that government accommodations of religious speech serve a secular purpose. The Act accomplishes that purpose by eliminating the chill on speech that results from the threat of Establishment Clause suits. That the Act mentions only religious expression presents no constitutional concerns because Establishment Clause actions, with their lax standing requirements coupled with the potential for damages and attorney's fees, create an exposure for government entities that does not exist in other types of cases.

Just as the Act has a predominantly secular purpose, it does not have as its primary effect the advancement or inhibition of religion. When deciding whether legislation runs afoul of the Establishment Clause, courts consider "whether an objective observer, acquainted with the text, legislative

143 *Id.* at 1389.

144 *McCreary v. Stone*, 739 F.2d 716, 726 (2d Cir. 1984); *Flamer v. City of White Plains, N.Y.*, 841 F.Supp. 1365, 1376-77 (S.D.N.Y. 1993).

history, and implementation of the statute, would perceive it as a state endorsement of [religion]."[145]

Because the Act is still in its formative stages, there currently is little legislative history and no implementation for a reasonable observer to consider. The plain meaning of the text does not suggest that it primarily benefits or burdens religion. The type of speech the Act seeks to protect consists only of constitutionally protected expressions of religion. An objective reading of the Act's language reveals that its intent and effect is merely to free government actors from the shadow of potential liability for damages and fees in an area where free speech has been significantly chilled by frivolous lawsuits. No reasonable observer could conclude that the Act conveys the message to any religious group "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[146]

In sum, the Act passes constitutional muster because it has the predominately secular purpose of limiting government liability and fostering free speech, and because the Act does not have the primary effect of

145 *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985)) (O'Connor, J., concurring in judgment).

146 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

advancing or inhibiting religion. H.R. 2679 presents no Establishment Clause problems.

VI. SECTION 1983 DAMAGES AND SECTION 1988 ATTORNEY'S FEES AWARDS ARE NOT APPROPRIATE IN ESTABLISHMENT CLAUSE JURISPRUDENCE.

After examining both Section 1983 and Section 1988, it is clear that neither, in its current state, is in line with the original legislative intent. Section 1983 was intended to serve as a means of vindication for civil rights violations. Opening up the floodgate for Establishment Clause cases by relaxing the rules for standing, combined with awarding attorneys fees under Section 1988, has spawned frivolous litigation and often results in government officials changing a course of action because of the threat of attorney's fees. The fee shifting statute is used to intimidate local government officials into action oftentimes not warranted under the Establishment Clause. Facing the threat of attorney's fees, local officials will do whatever a particular party demands. "'Private attorney generals' should not be deterred from bringing good faith actions to vindicate the fundamental rights involved by the prospect of having to pay their opponent's counsel fees should they lose."[147] The purpose of Sections 1983 and 1988 is to provide access to the courts for those with civil rights claims.

147 S. Rep. No. 94-1011 (1976).

Because of the peculiar and unfortunate status of Establishment Clause jurisprudence, this Committee should amend Sections 1983 and 1988 to exclude damages and attorney's fee and cost awards in Establishment Clause claims.